No. 89-37

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In The
Supreme Court of the United States
October Term, 1988

TRUSTEES OF IRON WORKERS LOCAL 473 PENSION TRUST,

Petitioner,

vs.

ALLIED PRODUCTS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer completely withdraws from a multiemployer pension plan, within the meaning of section 4203(a)(2) of the Employee Retirement Income Security Act, 29 U.S.C. §1383(a)(2), when it ceases normal business activity, rather than when it completes liquidation of the business and terminates the last bargaining unit employee.

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were the Trustees of Iron Workers Local 473 Pension Trust and Allied Products Corporation. The Trustees are not incorporated.

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For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in this case on April 13, 1989.

OPINIONS BELOW

This Petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit reported at 872 F.2d 208. It appears in Appendix A, infra (App. 1a-14a). The opinions of Judge Nordberg and Magistrate Rosemond of the United States District Court for the Northern District of Illinois are reported

at 8 EBC 1966 and 8 EBC 1959 respectively and are set forth in Appendices B and C, infra (App. 15a-28a).

JURISDICTION

The decision of the Court below issued on April 13, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 4203(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §1383(a), provides in pertinent part as follows:

> For the purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer–
>
> (1) permanently ceases to have an obligation to contribute under the plan, or
>
> (2) permanently ceases all covered operations under the plan.

STATEMENT OF THE CASE

At issue in this case is the proper interpretation to be accorded section 4203(a)(2) of ERISA. More particularly, it presents the issue of when "an employer . . . permanently ceases all covered operations under the plan" within the meaning of section 4203(a)(2). 29 U.S.C. §1383(a)(2).

A.
The Facts

The facts are straightforward and were stipulated by the parties in the proceedings below. Steel Weldments Division of Allied Products Corporation ("Allied" or "the Company") contributed to the Iron Workers Local 473 Pension Plan ("the Plan") pursuant to collective bargaining contracts at its Bedford Park, Illinois plant. In the ten-year period ending June 30, 1982, Allied's average annual contribution covered over 290,000 hours of work. This amounted to an average of over 178 full-time equivalent employees per year.

On June 16, 1982, Allied announced that it had decided to permanently shut down and close its Bedford Park plant operations. Within a few months, Allied implemented this decision. On July 2, 1982, the Company executed a Shutdown and Severance Pay Agreement with the Union. By October 1982, the Company terminated over 40 of the remaining bargaining unit employees leaving only three unit members on the payroll. Allied employed this skeleton crew for the purpose of cleaning, maintenance and shipping inventory. During the remainder of the plan year ending June 30, 1983, the Company made contributions for approximately 300 hours per month.

During the 1984 plan year, only two bargaining unit employees were employed for the purpose of cleaning, maintenance and the shipment of parts, scrap, raw materials, fixtures and inventory. Their only production work amounted to approximately 20 hours of machining in August or September of 1983. All of these activities constituted bargaining unit work. On March 30, 1984, Allied sold the plant and terminated the last covered employee.

The Trustees of Iron Workers Local 473 Pension Trust (the "Trustees") determined that Allied completely withdrew from the Plan during the plan year ending June 30, 1983 when Allied ceased virtually all covered operations at the facility and stopped normal business operations. Allied, on the other hand, asserted that its withdrawal occurred in the plan year ending June 30, 1984, when the last bargaining unit employee was terminated. Depending on the date of Allied's withdrawal, there is a difference of approximately $235,000 in the amount of withdrawal liability owed to the Trust.

The dispute was submitted to Arbitrator Harold E. Dreyer on a stipulated record pursuant to ERISA section 4221(a), 29 U.S.C. §1401(a) (1982). On May 24, 1984, the Arbitrator ruled in Allied's favor concluding that Allied's complete withdrawal did not occur until the plan year ending June 30, 1984.

On June 22, 1984, the Trustees timely filed their Complaint in the United States District Court for the Northern District of Illinois, to vacate the Arbitrator's award and to collect withdrawal liability. Jurisdiction in the district court was based upon a federal

question. 28 U.S.C. §1331 (1982). The case was referred to Magistrate Rosemond and the parties filed cross-motions for summary judgment. The Magistrate entered his Report and Recommendation in favor of the Trustees. On June 8, 1987 the district court adopted the Magistrate's recommendations and granted summary judgment in favor of the Trustees.

B.
The Seventh Circuit Decision

On April 13, 1989, the United States Court of Appeals for the Seventh Circuit reversed the district court. The Seventh Circuit held that "Section 1383(a)(2)'s plain language requires a finding that *all* covered operations permanently stop before a complete withdrawal occurs." (App. 14a). The court applied the "maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning" and defined "all" as 100 percent (App. 12a). In reaching its conclusion, the court refused to apply the interpretation adopted by other federal courts and contained in the legislative history which defines a complete withdrawal as "a virtually complete cessation of contributions, e.g., a 98-percent reduction." (App. 10a n.8). The court reasoned that "resort to legislative history was unnecessary. . . because the statute is clear and unambiguous." (App. 10a-11a). Therefore, it determined that a complete withdrawal did not occur until the plan year ending June 30, 1984.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S INTERPRETATION OF SECTION 4203 CONFLICTS WITH ESTABLISHED RULINGS AND WILL CAUSE CONFUSION IN THE ADMINISTRATION OF THE STATUTE.

Since its inception, section 4203 consistently has been interpreted to mean that a complete withdrawal occurs where an employer has "ceased virtually all operations at the facility for which the employer makes contributions to the plan." H.R. Rep. 96-869(I), 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong & Ad. News 2918, 2936 (1980). Congress expressed this

intent throughout the legislative history. This was the only interpretation given section 4203 by Congress. *Id.* at 2941; *See also* The Committee on Labor and Human Resources of the United States Senate, 96th Cong., 2d Sess., The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 12-13 (Comm. Print 1980).

Moreover, since its enactment, *every* other court that has interpreted section 4203 has concluded that a complete withdrawal occurs when the employer has ceased normal business operations even though it continues work related to liquidation. *Crown Cork and Seal Co. v. Central States Southeast and Southwest Areas Pension Fund,* No. 84 Civ. 5737, slip op. at 11-12 (E.D. Pa. Dec. 30, 1988), *appeal docketed,* No. 89-1086 (3d Cir. 1989); *Combs v. Leishman,* 691 F.Supp. 424, 430-31 (D.D.C. 1988); *Connors v. Economy Bldg. Systems,* 651 F. Supp. 849, 853 (D.D.C. 1986); *ILGWU Nat. Retirement Fund v. Weatherall Fashions, Inc.,* No. 84 Civ. 0772, slip op. (S.D.N.Y. 1986); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.,* 607 F. Supp. 570 (S.D.N.Y. 1985); *F.H. Cobb Co. v. N.Y. State Teamsters Pension Fund,* 584 F. Supp. 1181, 1182 (N.D.N.Y. 1984); *Speckman v. Barford Chevrolet Co.,* 535 F. Supp. 488 (E.D. Mo. 1982).

Now, despite almost a decade of uniform interpretation, the Seventh Circuit has departed from this principle in ruling that a complete withdrawal can only occur where there is a "100 percent" cessation of bargaining unit work, *i.e.,* after the last man is terminated (App. 12a). The Seventh Circuit's decision is in direct conflict with the decisions of the district courts cited above which uniformly hold that "a minimal amount of work does not defeat a complete withdrawal," *Connors v. Economy*

Bldg. Systems, 651 F.Supp. 849, 853 (D.D.C. 1986).[1] Unless this conflict is resolved, the Seventh Circuit's decision will cause confusion in administration of MPPAA.

The withdrawal liability provisions of MPPAA are not centrally administered. Rather, under MPPAA, the plan sponsor determines in the first instance whether a withdrawal has occurred. Thereafter, the plan sponsor shall determine the amount of withdrawal liability, notify the employer of the amount and collect the withdrawal liability. 29 U.S.C. §§1382, 1399. Because the sponsor of each individual plan must determine when a withdrawal occurs, it is likely that some plans will adopt the Seventh Circuit's interpretation while others will follow the traditional view. Consequently, employers who contribute to more than one fund could be faced with inconsistent demands for withdrawal liability even though those demands are based upon the same conduct.

Additionally, if the split between the Seventh Circuit and the district courts is not resolved, the sponsor of a multiemployer fund may be required to apply different definitions of a complete withdrawal to participating employers depending upon the location of the facility for which the employer is contributing to the plan. This is because multiemployer funds are frequently administered in more than one judicial circuit. Thus, the Court should review the decision of the Seventh Circuit in this case to insure uniformity in the administration of MPPAA.

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[1] The Seventh Circuit is the first federal court of appeals to address this issue. Thus, there currently is no conflict with the decision of another federal court of appeals on the same matter. However, an imminent conflict exists because a case involving this same issue is on appeal before the Third Circuit Court of Appeals. *Crown Cork and Seal Co. v. Central States Southeast and Southwest Areas Pension Fund,* No. 84 Civ. 5737, slip op. at 11-12 (E.D. Pa. Dec. 30, 1988), *appeal docketed,* No. 89-1086 (3d Cir. 1989). Also, the United States Court of Appeals for the Second Circuit has recognized that "the mere retention of a few employees for the purpose of winding down a business operation" does not prevent a complete withdrawal. *Barbizon Corp. v. ILGWU Nat. Retirement Fund,* 842 F. 2d 627, 632 (2d Cir.), *cert. denied,* 109 S. Ct. 495 (1988).

II.
THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT.

The issue of when a complete withdrawal occurs is of paramount importance to the administration of multiemployer pension plans. As the Committee on Labor and Human Resources of the United States Senate explained:

> The cessation of contributions by an employer to a multiemployer plan can seriously harm the plan. The plan is often obligated to pay benefits to that employer's employees, yet because benefits are funded over many years after they are promised, the withdrawing employer may not have made sufficient contributions to the plan to fund a share of the cost of those benefit promises. (96th Cong., 2d Sess., The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 12 (Comm. Print 1980)).

In response to this problem, MPPAA generally requires that a withdrawing employer fund its share of the unfunded vested liabilities when it withdraws from the plan.

The Seventh Circuit's interpretation of section 4203 frustrates the objectives of Congress by assessing withdrawal liability when the last covered employee is terminated instead of when contributions are diminished. Here for example, Allied was a substantial contributor to the Plan. Between July 1, 1972 and June 30, 1981, Allied contributed over $1.3 million to the Plan, which amounts to more than seven percent of total contributions. As it wound down its business activity and terminated covered employees, however, Allied's contributions dropped to a low of $327.56 in November of 1982. Yet, the employees have a right to receive pension benefits from the Plan. Thus, the Plan was placed in the position of having to pay benefits while contributions were greatly reduced.

If a complete withdrawal does not occur until the last covered employee is terminated, the burden of funding the employer's share of promised benefits will fall on multiemployer plans during

the time that the employer winds down covered operations.[2] This result is contrary to the federal policy of "assuring the equitable character of such plans and their financial soundness." 29 U.S.C. §1001(a). Because of the importance of employee benefit plans to "the continued well-being and security of millions of employees and their dependents," *id.*, this Court should grant this Petition for a Writ of Certiorari to settle, once and for all, when an employer "permanently ceases all covered operations under the plan."

III.
CONTRARY TO THE RULINGS OF THIS COURT, THE SEVENTH CIRCUIT DISREGARDED CLEARLY EXPRESSED LEGISLATIVE INTENT IN INTERPRETING SECTION 4203.

Relying on the plain meaning rule of statutory construction, the Seventh Circuit determined that its interpretation of section 4203 was compelled by what it considered clear and unambiguous statutory language (App. 10a-11a). Yet, Congress and the courts have given the phrase "all covered operations" a contrary interpretation. For that reason alone, the Seventh Circuit misapplied the plain meaning rule.

Moreover, the Seventh Circuit's decision is flawed because it disregarded clearly expressed legislative intent, thus substituting its own interpretation of section 4203 for that of Congress. In so doing, the Seventh Circuit ignored established rulings of this Court.

It is well accepted that "[i]n the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 542 (1940). This Court frequently has enunciated the rule to be applied in such cases as follows:

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[2] Although MPPAA includes liability for a partial withdrawal, 29 U.S.C. §1385, that provision only applies where there has been a seventy percent reduction in contributions for the past three testing years.

> [I]n determining the scope of a statute, one is to look first at its language. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. (*North Dakota v. United States,* 460 U.S. 300, 312 (1983) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980)).

See also *American Tobacco Company v. Patterson,* 456 U.S. 63, 68 (1982); *Aaron v. Securities and Exchange Commission,* 446 U.S. 680, 695 (1980). However, where there is a clearly expressed legislative intent to the contrary, this Court has stated:

> [A]scertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect. (*Watt v. Alaska,* 451 U.S. 259, 266 (1981) (citations omitted)).

The Seventh Circuit's refusal to consider the legislative history in this case is completely at odds with the rulings of this Court because Congress clearly expressed the intention that a complete withdrawal could occur where there is less than a 100 percent reduction in bargaining unit work.

In enacting MPPAA, Congress consistently expressed the intent that a complete withdrawal may occur even though some minimal level of work incidental to the liquidation of the business is being performed. The House Report on MPPAA states:

> It is intended . . . that a complete withdrawal occurs, as under current law, where an employer has ceased virtually all operations at the facility for which the employer makes contributions to the plan.
>
> * * *
>
> The bill would treat an employer as withdrawing from a multi-employer plan when the employer (1)

> permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. Current law does not define a withdrawal. As under current law, a virtually complete cessation of contributions, e.g., a 98% reduction, that has the same effect on the plan as a complete cessation of contributions, is a complete withdrawal.

H.R. Rep. 96-869(I), 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2936, 2941 (1980). The Committee on Labor and Human Resources of the United States Senate expressed a similar view:

> The Committee intends that covered operations be treated as having ceased when business activity substantially ceases or when it continues but no longer gives rise to contributions under the plan. (96th Cong., 2d Sess., The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 12-13 (Comm. Print 1980)).

Despite this clear expression of legislative intent, the Seventh Circuit erroneously held that "all (100 percent) of the covered operations must permanently cease before finding that an employer has completely withdrawn from a multiemployer plan," and that any ongoing unit work whatsoever – even de minimis maintenance functions attendant to liquidation – constituted covered operations (App. 12a, 13a n.10).

As this Court has recognized, "[s]ole reliance on the 'plain language' of [the statute] would assume the answer to the question at issue." *Watt v. Alaska*, 451 U.S. at 266. If this decision is allowed to stand, Congress's intent will be thwarted. Therefore, the petition should be granted to insure that this federal statute is administered in accordance with congressional intent.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 11, 1989

APPENDICES

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-2108

TRUSTEES OF IRON WORKERS
LOCAL 473 PENSION TRUST,

Plaintiff-Appellee,

v.

ALLIED PRODUCTS CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 5329—**John A. Nordberg,** *Judge.*

ARGUED JANUARY 7, 1988—DECIDED APRIL 13, 1989

Before FLAUM, MANION, and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* Allied Products Corporation ("Allied") appeals the district court's decision granting summary judgment in favor of the Trustees ("Trustees") of Iron Workers Local 473 Pension Trust ("the Plan"). The Trustees sought to vacate or modify a withdrawal liability arbitration award and to collect withdrawal liability payments under the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980. The arbitrator had held that Allied completely withdrew from the Plan in the plan year ending June 30, 1984, while the Trustees

claimed that Allied completely withdrew from the Plan in the plan year ending June 30, 1983. (Depending on the date of Allied's withdrawal, there is a swing of nearly $200,000 in the amount owed in withdrawal liability.) The district court vacated the arbitrator's award. For the reasons stated below, we reverse the district court's judgment, but hold that it properly reviewed the arbitrator's legal determinations de novo.

I.

The facts are straightforward and undisputed.[1] Since May 1, 1959, Allied and Shopmen's Local Union No. 473 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO ("Union") were parties to collective bargaining agreements covering production and maintenance employees at Allied's plant in Bedford Park, Illinois. These agreements required, among other things, contributions by Allied to the Plan based on each hour worked by covered employees. The Plan was most recently amended and restated as of May 1, 1979.

The pension plan year ("plan year") runs from July 1 through June 30. On June 16, 1982, Allied informed the Union that it would permanently shut down its Bedford Park plant operations. On July 2, 1982, Allied and the Union executed a Shutdown and Severance Pay Agreement which stated in part: "[t]he terms and conditions as set forth in the collective bargaining agreement . . . as amended, shall continue in full force and effect, except as hereinafter modified by this Severance Agreement, as long as any bargaining unit member remains employed."

In the plan year ending June 30, 1982, Allied contributed $79,669.91 for 111,573 participant hours. For the plan year ending June 30, 1983, Allied's contributions declined

[1] With slight modification we have lifted the magistrate's recitation of the facts, and note that the parties stipulated to the facts before the arbitrator.

to $10,338.56 for 13,854.75 participant hours. From July 1, 1983, through December 1983, Allied's contributions fell to $1,432.50 for 1,910 participant hours.

There were 48 employees working for Allied for the payroll week ending July 4, 1982. Five employees remained at the plant by the end of August 1982. Of these five, two were terminated in September and two more in December 1983. One employee, Donald Steele, a maintenance man, worked continuously at the Bedford Park plant and was still on the payroll at the end of December 1983. Two of the five remaining employees, Charles Hearod, a forklift operator, and Lester Banks, a fitter/welder, were recalled by Allied in February 1983. Banks subsequently was terminated in April 1983, while Hearod worked at the plant continuously from the date of his recall through December 1983.

Banks was called back to work for the purpose of welding and finishing certain heat exchangers which were preassembled but not finished. Hearod and Steele assisted in the finishing work as well, and also worked the shear press and brake press to machine certain seal retainers in August and/or September 1983 for approximately ten hours each. In June 1983, these employees also performed 16 hours of welding on exhaust duct assembly units. All other work performed by these employees included cleaning and maintenance work and the identification, weighing and shipment of parts, scrap, raw materials and fixtures in inventory. These activities, it was stipulated, all constituted bargaining unit work.

Although Allied informed the Union in June 1982 of its intent to permanently shut down its Bedford Park plant operations, Allied still received, processed and filled seven purchase orders during 1983, the last one in September 1983. In addition, after July 1, 1982, Allied identified, loaded and shipped numerous items of scrap, parts, and fixtures to its other divisions.

On November 15, 1982, the Trustees sent Allied a notice of multiemployer plan withdrawal liability, a demand for

payment of $559,108.57, and stated that the entire amount was due by January 1, 1983. Alternatively, the Trustees permitted Allied to make 27 monthly installment payments of $23,791.33 with a 28th payment of $7,495.81, beginning January 1, 1983. The amount of withdrawal liability was determined by the Trustees as of June 30, 1982, based on the Trustees' conclusion that a complete withdrawal had occurred during the plan year ending June 30, 1983.

On February 14, 1983, Allied submitted to the Trustees a request for review. On June 17, 1983, the Trustees responded to Allied's request, refusing to alter its November 15, 1982 notice and demand. Allied then initiated arbitration proceedings on August 10, 1983, seeking review of the Trustees' determination under 29 U.S.C. § 1401(a).

The arbitrator concluded that "the Plan's determination that [Allied] withdrew from the Plan during the plan year ending June 30, 1983 and that [Allied's] withdrawal liability should therefore be determined based on the Fund's unfunded vested benefits as of June 30, 1982 is clearly erroneous and must be set aside." The arbitrator further concluded that a complete withdrawal had occurred during the plan year ending June 30, 1984, and that the Plan should immediately determine Allied's withdrawal liability based on the Fund's unfunded vested benefits as of June 30, 1983.

The district court referred the Trustees' suit to vacate the arbitration award to a magistrate. Reviewing the arbitrator's decision de novo, the magistrate held that the arbitrator misinterpreted 29 U.S.C. § 1383(a)(2) (withdrawal occurs when an employer permanently ceases all covered operations), and thus vacated the award. The arbitrator read § 1383(a)(2) literally (all means all), while the magistrate, relying on a single passage of legislative history, held that all meant "virtually all." Under the latter interpretation, the magistrate held that Allied completely withdrew from the Plan in the plan year ending June 30, 1983, as the Trustees claimed. The district court

adopted the magistrate's report and recommendation, writing separately to emphasize the court's authority to review de novo the arbitrator's decision.

II.

We confront two issues on appeal:[2] the proper standard of review of an arbitrator's award, and the interpretation to be given 29 U.S.C. § 1383(a)(2).

A. Statutory Background

ERISA subjects employers who withdraw from multiemployer pension plans to so-called withdrawal liability in an amount equal to their statutory share of the plan's unfunded vested liabilities. 29 U.S.C. § 1381. A "complete withdrawal" occurs when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a).[3] "[T]he date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." 29 U.S.C. § 1383(e).

Following an employer's withdrawal from a multiemployer pension plan, the plan sponsor is required to determine the amount of withdrawal liability owed, notify the employer of this amount, and demand payment. 29 U.S.C. §§ 1382, 1399(b)(1). The amount of an employer's withdrawal liability is determined as of the last day of the

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[2] We are aided by the Pension Benefit Guaranty Corporation's ("PBGC") *amicus curiae* brief. The PBGC's views are entitled to deference because of its responsibility to enforce Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (which includes ERISA's withdrawal liability provisions). *Robbins v. McNicholas Transportation Co.*, 819 F.2d 682, 686 (7th Cir. 1987).

[3] On appeal, the Trustees have abandoned their claim that Allied ceased to have an obligation to contribute under the Plan. 29 U.S.C. § 1383(a)(1).

plan year preceding the plan year in which the withdrawal occurs.[4] 29 U.S.C. § 1391(b)(2)(A). Within 90 days after notice and demand have been made, the withdrawing employer may request that the Plan review its determination. 29 U.S.C. § 1399(b)(2)(A). The Plan must notify the employer of its decision after its review. 29 U.S.C. § 1399(b)(2)(B). An employer may then initiate arbitration within the 60-day period after the earlier of (1) the date of notification to the employer of the Plan's decision on review, or (2) 120 days after the date of the employer's request for review. 29 U.S.C. § 1401.

Any party to the arbitration may appeal to an appropriate federal district court to "enforce, vacate, or modify the arbitrator's award." 29 U.S.C. § 1401(b)(2). "[T]o the extent consistent with [Title IV of ERISA]," arbitration proceedings "shall . . . be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9 [(Federal Arbitration Act)]." 29 U.S.C. § 1401(b)(3). On review, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c).

B. Arbitrator's Award; Standard of Review

Like every other federal appellate court which has addressed this question, we hold that district courts may

[4] This is what this dispute really is all about. If Allied's withdrawal is said to have occurred in the plan year ending June 30, 1984, as Allied urges, the alleged withdrawal liability equals $364,000. If, on the other hand, the Trustees are correct and a complete withdrawal occurred in the plan year ending June 30, 1983, the alleged withdrawal liability jumps to $559,108.57. (Given our resolution of this case, we need not consider whether the Trustees are correct in asserting that the district court made a clerical error and that this amount should be $599,108.57.)

fully review the arbitrator's legal determinations. *Union Asphalts and Roadoils, Inc. v. Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230, 1233-34 (8th Cir. 1988); *Trustees of Amalgamated Ins. Fund v. Geltman Industries, Inc.*, 784 F.2d 926, 928-29 (9th Cir.), *cert. denied*, 479 U.S. 822 (1986); *Board of Trustees of the Western Conference of Teamsters Pension Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1405-06 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Int'l Ass'n of Machinists Nat'l Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984); *Republic Industries, Inc. v. Teamster Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

We also agree with the Eighth Circuit that neither *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd by an equally divided court*, 481 U.S. 735 (1987) (per curiam) nor *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984) are to the contrary. As that court explained:

> In *United Retail* and *Washington Star Co.*, the courts did not review an arbitrator's legal determinations; instead, the courts dealt with constitutional issues involving MPPAA. *See United Retail*, 787 F.2d at 129; *Washington Star Co.*, 729 F.2d at 1503. We do not believe either decision can be characterized as designating a standard for review of the arbitrator's legal determinations. *See United Retail*, 787 F.2d at 135 n.9 (passing remark in a footnote); *Washington Star Co.*, 729 F.2d at 1505 (introductory outline of section 1401 that did not mention *Stockton Tri Industries*, 727 F.2d at 1207 n.7). Thus, although UA looks to *United Retail* and *Washington Star Co.* for support, the courts in those cases did not decide the current issue.

Union Asphalts, 857 F.2d at 1233-34. Moreover, we reject Allied's argument that *Washington Star, supra*, overruled *Stockton Tri Industries, supra*. These cases were decided only a few weeks apart, *Washington Star* (the latter of the two) made no mention of *Stockton Tri Industries*, let alone claimed to overrule it, and Judge Edwards, the author of *Washington Star*, was on both panels.[5]

We also find *United Retail* unpersuasive (on the standard of review issue) for another reason. There, the Third Circuit refused to read § 1401(c)'s omission of any standard of review regarding arbitral legal determinations as "suggesting that the district court has plenary review over the arbitrator's findings of law." *United Retail*, 787 F.2d at 135 n.9. In support of its conclusion, the court relied on its "settled policy of extreme deference to an arbitrator's legal as well as factual determinations," citing *United Steelworkers of America, District 36 v. Adbill Management Corp.*, 754 F.2d 138 (3d Cir. 1985). *United Retail*, 787 F.2d at 135 n.9 The court's reliance on *Adbill*, however, was misplaced. *Adbill* involved the review of a labor arbitrator's award issued pursuant to the parties' collective bargaining agreement. In that situation, judicial deference is "mandated by Congress' preference that this contractually agreed upon vehicle for dispute resolution be the 'final' method of adjustment among parties." *Stockton Tri Industries*, 727 F.2d at 1207 n.7. By contrast, withdrawal liability arbitration is a statutorily required proceeding (29 U.S.C. § 1401(a)(1)), the matters

[5] It is true, though, as Allied points out, that the D.C. Circuit, in stating that the arbitrator's decision is "fully reviewable to determine whether applicable statutory law has correctly been applied and whether the findings comport with the evidence," incorrectly cited to § 1401(a)(3)(A) (plan sponsor's determinations presumed correct) for that proposition, and not to § 1401(c) (rebuttable presumption that arbitrator's findings of fact were correct). *Stockton Tri Industries*, 727 F.2d at 1207-08 n.7. But given that court's parenthetical explanation (which refers to the *arbitrator's* decision) we don't believe it misread or misunderstood ERISA, as the Trustees believe.

of which are to be determined by Congress' intent, not the parties'. *See Teamsters Pension Trust Fund v. Allyn Transportation Co.*, 832 F.2d 502, 505 (9th Cir. 1987); *see also Stockton Tri Industries*, 727 F.2d at 1207 n.7.

Allied also contends that the extremely limited power of review provided for by the Federal Arbitration Act, 9 U.S.C. §§ 1-14, controls here. We disagree. While it is true that § 1401(b)(3) (which concerns withdrawal liability arbitration proceedings) incorporates the Federal Arbitration Act,[6] it does so only to the extent it is consistent with 29 U.S.C. §§ 1301-1461. As have the Fourth and Eighth Circuits, we hold that the limited review permitted by § 10 of the Arbitration Act (9 U.S.C. § 10) is inconsistent with § 1401(b)(2)'s broad mandate allowing courts to "enforce, vacate, or modify the arbitrator's award." *Union Asphalts*, 857 F.2d at 1234; *Republic Industries*, 718 F.2d at 641. Thus, we conclude that courts may fully review an arbitrator's legal determinations.

C. Section 1383(a)(2)'s Interpretation.

So far as is relevant here, a complete withdrawal occurs when an employer "permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a)(2). But in spite of the clear language requiring that "all covered operations" cease before a complete withdrawal occurs, the district court held it was sufficient if "virtually all" (as opposed to "all") covered operations came to a halt

[6] Actually, § 1401(b)(3) does not expressly incorporate § 10 of the Federal Arbitration Act. Section 10 lists the various grounds for which an arbitrator's award may be vacated (fraud, bias, arbitral misconduct, etc.). Section 1401(b)(3), though, does not speak of suits to vacate arbitration awards, but rather, says the Federal Arbitration Act will, to the extent it is consistent with ERISA, govern "arbitration proceedings" and the "enforce[ment]" of the arbitrator's award. Thus, § 10's limited grounds for review arguably have no application to suits to vacate withdrawal liability awards. We need not decide this issue, though, because of our holding that, even if § 10 does apply, it would be inconsistent with § 1401(b)(2).

in order to trigger withdrawal liability. It did so, as have other district courts,[7] by relying on a passage from the relevant legislative history. H.R. Rep. No. 896 Part I, 96th Cong., 2d Sess. 73, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2941.[8] The resort to legisla-

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[7] These cases include: *Combs v. Leishman*, 691 F.Supp. 424, 430-31 (D.D.C. 1988); *Connors v. Economy Building Systems, Inc.*, 651 F.Supp. 849, 853-54 (D.D.C. 1986); *ILGWU National Retirement Fund v. Weatherall Fashions, Inc.*, No. 84 Civ. 9772, slip op. (S.D.N.Y. 1986); *F. H. Cobb Company v. New York State Teamsters Conference Pension and Retirement Fund*, 584 F.Supp. 1181, 1183 (N.D.N.Y. 1984); *Speckman v. Barford Chevrolet Co.*, 535 F.Supp. 488, 491 (E.D. Mo. 1982). None of these cases concluded § 1383(a)(2) was ambiguous, unclear, or would lead to absurd or unjust results if the plain language were followed before turning to the legislative history.

[8] That passage states:

> The bill would treat an employer as withdrawing from a multiemployer plan when the employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. Current law does not define a withdrawal. As under current law, a virtually complete cessation of contributions, e.g., a 98-percent reduction, that has the same effect on the plan as a complete cessation of contributions, is a complete withdrawal.

At oral argument, the Trustees also brought to our attention a portion of the report drafted by the Senate's Labor and Human Resources Committee. But that section has to do with whether a particular withdrawal was permanent, not with whether all or only some covered operations ceased. Thus, the Report states "[a] plan sponsor need only make a reasonable determination based on the evidence available that the cessation of covered operations or obligation to contribute is not merely temporary. The Committee intends that covered operations be treated as having permanently ceased when business activity substantially ceases or when it continues but no longer gives rise to contributions to the plan." S. Rep. 1076, 96th Cong., 2d Sess. at 12, 13. Here, the question is not whether Allied's cessation of business activity was permanent or merely temporary (everyone agrees it was permanent); rather, the question is when "all covered operations" came to a halt. The Report hardly clarifies the issue here; but even if it was consistent with the House Report, there was no need to resort to legislative history because the statute itself is clear.

tive history was unnecessary, however, because the statute is clear and unambiguous. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) (where "resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear"). Legislative history may be consulted in rare and exceptional circumstances even when the statute is clear, or if the application of the statute's plain language produces absurd or unjust results. *Meredith v. Bowen*, 833 F.2d 650, 654 (7th Cir. 1987); *Wilson v. Harris Trust & Savings Bank*, 777 F.2d 1246, 1249 (7th Cir. 1985) (per curiam); *Pullman-Standard v. Interstate Commerce Commission*, 705 F.2d 875, 879 (7th Cir. 1983). But where, as here, none of these factors are present, the clear language should be the guide to congressional intent. Discarding the plain language of a statute in favor of committee reports or other legislative history ignores the realities of the legislative process. The crafting of specific language often reflects legislative compromise reached after hard fought battles over the means to reach even common goals. Courts should only reluctantly turn to legislative history for fear of upsetting the delicate balance reflected in a finally worded piece of legislation.[9] *Cf. Central States Southeast and Southwest Areas Pension Fund v. Bellmont Trucking Co., Inc.*, 788 F.2d 428, 433-34 (7th Cir. 1986) (quoting *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. 361, 373-74 (1986)). In this case "the plain language" of the

[9] Relying on legislative history, especially where, as here, the statute is clear, can produce odd results and even encourage potential abuse. "Committee reports that contradict statutory language or purport to explicate the meaning or applicability of particular statutory provisions can short-circuit the legislative process, leading to results never approved by Congress or the President." *Wallace v. Christensen*, 802 F.2d 1539, 1560 (9th Cir. 1986) (Kozinski, J., dissenting); *see also Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

statute "is the best evidence of [its] meaning." *Meredith*, 833 F.2d at 654.

Section 1383(a)(2) says that "all covered operations" must permanently cease for a complete withdrawal to occur. 29 U.S.C. § 1383(a)(2). "It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985). The common meaning of "all" is 100 percent. *Central States Southeast and Southwest Areas Pension Fund v. Bellmont Trucking Co., Inc.*, 610 F.Supp. 1505, 1510 (N.D. Ind. 1985), *aff'd*, 788 F.2d 428 (7th Cir. 1986). That Congress meant 100 percent when it said "all" is buttressed by the fact that in several other places, the statute qualifies "all" by using the phrase "substantially all." 29 U.S.C. §§ 1383(b)(1)(A), 1384(a)(3)(A), 1389(c), and 1405(a)(1). Plainly, Congress knew the difference between "all," "substantially all," and "virtually all"; and it opted for the unqualified "all" in 29 U.S.C. § 1383(a)(2). As we read § 1383(a)(2), then, there simply is no other way to remain faithful to Congress' intent, as expressed by the statute's clear and unambiguous language, other than to hold that all (100 percent) of the covered operations must permanently cease before finding an employer has completely withdrawn from a multiemployer plan. We therefore agree with Allied and the PBGC, and respectfully decline to follow the lead of those district courts (*see supra* n.7) which have relied on the legislative history to reach a different result.

The Trustees argue, though, that our reading of § 1383(a)(2) may invite manipulation and abuse by scheming employers who will retain skeleton crews to avoid (delay) the imposition of withdrawal liability. We are not persuaded. First, there is no allegation of such manipulation or abuse on the part of Allied, so we do not face that situation here. But, more important, a remedy already exists for such a case. Under 29 U.S.C. § 1392(c), "[i]f a principal purpose of any transaction is to evade or avoid liability . . . [the withdrawal liability provisions] shall be applied (and

liability shall be determined and collected) without regard to such transaction." *Id.* Had Allied recalled its employees or kept them on the payroll merely to "evade or avoid liability," the Trustees could have pursued Allied under § 1392(c) regardless of the number of employees remaining or the continuation of covered operations. Thus, there is no need for us to take the drastic—indeed impermissible—step of rewriting the statute as the Trustees invite us to do.

Having interpreted § 1383(a)(2), we must now decide when Allied completely withdrew from the Plan. Allied announced in June 1982, its decision to close its Bedford Park plant. Allied and the Union negotiated a Shutdown Agreement to facilitate the closing and agreed to continue their collective bargaining agreement in effect for as long as any bargaining unit member was employed. The bargaining unit included all of Allied's production and maintenance employees engaged in the fabrication of iron, steel, metal and other products, or in maintenance work in or about the plant.

All the work performed at Allied's Bedford Park plant since June 30, 1983, was production and maintenance work within the meaning of the collective bargaining agreement,[10] and was performed by bargaining unit members.

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[10] The district court equated "covered operations" under 29 U.S.C. § 1383(a)(2) with what it termed "normal business operations" or with production work only. Section 1383(a)(2), however, speaks of "all covered operations under the plan," not production work. We think "covered operations" refers to those operations which are covered by the collective bargaining agreement (through the relevant bargaining unit definition) for which the employer must contribute to pension plan. *Cf. Speckman*, 535 F.Supp. at 491 (employer ceases "covered operations" if it ceases the business activity that gave rise to contributions to the plan). The business activity giving rise to contributions is the performance of bargaining unit work. Thus, the issue is whether bargaining unit work is being performed for which contributions are made, not simply whether production work is being performed. Here the Trustees stipulated that bargaining unit work was performed after June 1983.

Allied's employees produced and shipped products to some of its primary customers even after June 30, 1983 (the end of the 1983 plan year). Allied also received several purchase orders after June 30, 1983. Finally, throughout this period Allied continued to contribute to the Plan as provided for by the collective bargaining agreement.

On this record, we agree with the arbitrator that the Plan's determination that Allied completely withdrew during the plan year ending June 30, 1983 (and that its withdrawal liability should be determined based on unfunded vested benefits as of June 30, 1982) was clearly erroneous. As the arbitrator found, a complete withdrawal occurred during the plan year ending June 30, 1984; thus, Allied's withdrawal liability should be based on unfunded vested benefits as of June 30, 1983.

III.

In sum, we hold that the district court properly reviewed the arbitrator's award under the de novo standard of review. But the district court misinterpreted 29 U.S.C. § 1383(a)(2), finding a complete withdrawal occurred before all of Allied's covered operations permanently ceased. Section 1383(a)(2)'s plain language requires a finding that *all* covered operations permanently stop before a complete withdrawal occurs. Therefore, we reverse the district court and reinstate the arbitrator's award.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

DOCKETED

JUN 12 1987

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Name of Assigned Judge John A. Nordberg

Case Number 84 C 5329 Date June 8, 1987

Case Title Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.

MOTION: (In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented.)

Cross-Motions For Summary Judgment

DOCKET ENTRY (The balance of this form is reserved for notations by court staff.)

(1) [XX] Judgment is entered as follows:

Having reviewed the Report and Recommendation of the Magistrate, and the pleadings, briefs and objections of the parties, the court accepts and adopts the Magistrate's Report and Recommendation, with the clarifications noted on the reverse of this order, and hereby grants plaintiff's motion for summary judgment, denies defendant's motion for summary judgment, vacates the arbitrator's opinion and award, and reinstates the Trustees' withdrawal liability assessment of $559,108.57.

(12) [X] [For further detail see

[X] order on the reverse of

[X] order attached to the original minute order form.]

[X] Docketing to mail notices.

(Reserved for use by the Court)

ORDER

The court further notes that a finding that the court could not review legal conclusions of the arbitrator *de novo* would make little sense, exposing an arbitrator's factual findings to greater judicial scrutiny than his legal conclusions. Also, such a holding could render the statute unconstitutional. *See Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1404-06 (9th Cir. 1984) (employers not denied Article III judge because court reviews conclusion of law de novo), *cert. denied*, 471 U.S. 1054, 105 S.Ct. 2116 (1985).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

TRUSTEES OF IRON WORKERS
LOCAL 473 PENSION TRUST,

Plaintiff,

v.

No. 84 C 5329
Judge Nordberg

ALLIED PRODUCTS
CORPORATION,

Defendant

REPORT AND RECOMMENDATION

TO THE HONORABLE JOHN A. NORDBERG, one of the Judges of the United States District Court for the Northern District of Illinois.

This is an action to vacate or modify an arbitration award and to collect withdrawal liability payments pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1001-1461, which amended the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiff Trustees are the administrator and named fiduciary of the Iron Workers Local 473 Pension Plan ("the Plan"), a multiemployer pension plan as defined in 29 U.S.C § 1002 (37)(A). Defendant Allied Products Corporation ("Allied") is an employer within the meaning of 29 U.S.C. § 1002 (5). Presently before the court are the parties' cross-motions for summary judgment. These motions center around one basic issue: when did Allied withdraw from the Plan within the meaning of the MPPAA?

FACTS

The facts are clear and undisputed. The legal significance of those facts under applicable federal statutes is, however, hotly contested. Beginning on May 1, 1959, Allied and Shopmen's Local Union No. 473 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO ("the

Union") have been parties to collective bargaining agreements covering production and maintenance employees at Allied's plant in Bedford Park, Illinois. These agreements require, among other things, contributions by Allied to the Plan on the basis of specified cents per hour worked by covered employees. The Plan was most recently amended and restated as of May 1, 1979.

Under the agreement, the Pension Plan year runs from July 1 through June 30. On June 16, 1982, Allied informed the Union by letter that Allied had decided to permanently shut down and close its plant operations at Bedford Park, Illinois. Shortly thereafter, on July 2, 1982, Allied and the Union executed a Shutdown and Severance Pay Agreement which stated in part: "[t]he terms and conditions as set forth in the collective bargaining agreement . . . as amended, shall continue in full force and effect, except as hereinafter modified by this Severance Agreement, as long as any bargaining unit member remains employed."

In the Plan Year ending June 30, 1982, Allied contributed $79,669.91 for 111,573 participant hours. However, for the Plan Year ending June 30, 1983, Allied contributed only $10,338.56 for 13,854.75 participant hours; while from July 1, 1983 through December 1983, Allied's contributions were reduced by an even larger margin, $1,432.50 for 1,910 participant hours.

There were 48 employees working for Allied for the payroll week ending July 4, 1982. By the end of August 1982, only five employees remained at the plant. Of these five, two were terminated in September and two in December 1983. One employee, Donald Steele, a maintenance man, worked continuously at the Bedford Park plant and was still on the payroll at the end of December 1983. Two of the four previously terminated employees, Charles Hearod, a fork lift operator, and Lester Banks, a fitter/welder, were recalled by Allied in February 1983. Banks was terminated again in April 1983, but Hearod worked at the plant continuously from the date of his recall through December 1983.

Banks was called back to work for the purpose of welding and finishing certain heat exchangers which were pre-assembled but not finished. Hearod and Steele assisted in the finishing work

as well and also worked the shear press and brake press to machine certain seal retainers in August and/or September 1983 for approximately ten hours each. In June 1983 these employees also performed 16 hours of welding on exhaust duct assembly units. All other work performed by these employees was as follows: a) cleaning and maintenance work, and b) the identification, weighing and shipment of parts, scrap, raw materials and fixtures in inventory. These activities all constituted bargaining unit work.

Although Allied informed the Union in June 1982 that it had decided to permanently shut down operations at the Bedford Park plant, Allied still received, processed and filled seven purchase orders during 1983, the last one being in September 1983. In addition, since July 1, 1982, Allied identified, loaded and shipped numerous items of scrap, parts and fixtures[1] to its other divisions.

On November 15, 1982, the Trustees of the Plan sent to Allied a notice of multiemployer plan withdrawal liability, a demand for payment of $559,108.57, and stated that the entire amount was due by January 1, 1983. Alternatively, Allied was permitted to make 27 monthly installment payments of $23,791.33 with a 28th payment of $7,495.81, beginning January 1, 1983. The amount of withdrawal liability was determined by the Trustees as of June 30, 1982 based on the Trustees' conclusion that a "complete withdrawal" had occurred during the Plan Year beginning July 1, 1982 and ending June 30, 1983.[2]

On February 14, 1983, Allied submitted a request for review pursuant to ERISA § 4219 (b)(2)(A), 29 U.S.C. § 1399 (b)(2)(A). On June 17, 1983, the Trustees responded to this request for review, concluding that the November 15, 1982 notice and demand should stand without change. Allied then initiated arbitration on August 10, 1983, seeking review of the Trustees' determination

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[1] According to the custom and usage of the welding industry, a "fixture" is a durable casement or tooling device used in the mass fabrication of steel welded parts.

[2] The Trustees do not make a claim for "partial withdrawal liability.

pursuant to ERISA § 4219 (a), 29 U.S.C. § 1401 (a). In arbitration, Allied challenged the Trustees' determination of withdrawal liability on two grounds. First, Allied asserted that it did not withdraw prior to July 1, 1983. Second, Allied asserted that installment payments should have been required on a quarterly, rather than monthly basis.

On May 24, 1984, the arbitrator issued his opinion concluding that, "the Plan's determination that [Allied] withdrew from the Plan during the plan year ending June 30, 1983 and that [Allied's] withdrawal liability should therefore be determined based on the Fund's unfunded vested benefits as of June 30, 1982 is clearly erroneous and must be set aside."[3] The arbitrator further concluded that a complete withdrawal had occurred during the plan year ending June 30, 1984 and that the Plan should immediately determine Allied's withdrawal liability based on the Fund's unfunded vested benefits as of June 30, 1983. However, the arbitrator did uphold the Trustees' determination that Allied's withdrawal liability should be paid monthly rather than quarterly.[4] Less than a month later, on June 22, 1984, the Trustees filed this complaint in federal court to vacate the arbitrator's award and to collect the withdrawal liability as initially determined by the Trustees.

DISCUSSION

As a preliminary matter, this court must determine the standard of review for an arbitrator's legal rulings. Allied contends that the court's role in reviewing an arbitration award is strictly limited and is confined to determining whether or not one of the grounds specified by Section 10 of the United States

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[3] See Arbitrator's Opinion attached as Exhibit "A" to plaintiff's complaint.

[4] Allied does not appeal this ruling of the Arbitrator.

Arbitration Act for vacation of an award exists.[5] Further, Allied asserts that an arbitration award will not be vacated on the ground that the arbitrator misinterpreted applicable law. Plaintiffs on the other hand, argue that this court should decide the legal issues in this case *de novo* and not give the arbitrator's decision any deference whatsoever.

This court finds that it is not bound by the legal rulings of an arbitrator's decision under the MPPAA. As the Court of Appeals for the D.C. Circuit stated:

> [a]rbitration under MPPAA is quite plainly to be distinguished from arbitration based upon the contractual provisions of a collective bargaining agreement. Judicial deference to the latter kind of arbitration is mandated by Congress' preference that this contractually agreed upon vehicle for dispute resolution be

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[5] Section 10 of the United States Arbitration Act, 9 U.S.C. 10, specifies the limited grounds upon which an Arbitrator's award may be vacated, as follows:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

> the "final" method of adjustment among parties. [citations omitted] Therefore, agreements to arbitrate are routinely enforced, [citations omitted] and judicial review of arbitration decisions is very limited. [citations omitted] Under MPPAA, however, the decisions of a typical administrative agency, are fully reviewable to determine whether applicable statutory law has correctly been applied and whether the findings comport with the evidence. [citations omitted]

I.A.M. National Pension Fund v. Stockton TRI Industries, 727 F.2d 1204, 1207 n. 7 (D.C. Cir. 1984). In arguing for a strictly limited and confined judicial review, Allied fails to distinguish between arbitration under the MPPAA from arbitration based upon a collective bargaining agreement.

The cases relied on by Allied deal with arbitration in a non-MPPAA setting. The one case cited by Allied that can even remotely support its position is *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984), an MPPAA case which states in dicta that a "court must enforce the arbitrator's decision in accordance with the United States Arbitration Act, . . . which authorizes only limited review." *Id.*, at 1505. However, the very next sentence indicates that the court is referring to an arbitrator's factual findings: "[f]urthermore, the court must presume that the arbitrator's findings of fact are correct, unless they are rebutted by a clear preponderance of the evidence. . . " *Id.* In any event, the *Washington Star* court does not refer to the legal rulings of an arbitrator, which is the problem that this court must solve. Thus, *Washington Star* is inapposite to the situation at hand.

Finally, we agree with the Fourth Circuit's interpretation of this dilemma that "[t]he clear authorization of §1401(b)(2) for judicial review 'to enforce, vacate, or modify the arbitrator's award' gives a right to review an arbitrator's legal rulings." *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 641 (4th Cir. 1983). Because this case involves the arbitrator's statutory interpretation of ERISA §4203(a), 29 U.S.C. §1383(a), it calls for a review of his legal ruling. Accordingly, this court will review the legal issue present in these motions *de novo*.

As stated previously, the only issue for this court to resolve is when did Allied completely withdraw from the Plan within the meaning of the MPPAA. ERISA Section 4203(a), 29 U.S.C. §1383(a), which was added by the MPPAA of 1980, defines "complete withdrawal" as follows:

> For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer–
>
> 1) permanently ceases to have an obligation to contribute under the plan, or
>
> 2) permanently ceases all covered operations under the plan.

Both parties agree that the crucial issue here is in what Plan Year, 1982 or 1983, did Allied permanently cease all covered operations under the plan.

The first obstacle which this court must hurdle is what is meant by the phrase "all covered operations." The arbitrator ruled that in the context of §1383(a), "all" means 100 percent and not some lesser amount. In reaching this conclusion, the arbitrator disregarded the legislative history of §1383(a), and instead, found that, "nothing could be clearer than the language of the statute itself that a complete withdrawal means the permanent cessation of *all* covered operations . . . " This court respectfully disagrees with the arbitrator's conclusion for we believe that the phrase "all covered operations" is not altogether clear in meaning, and thus, this court will look to the legislative history, and also, to other sources for guidance as to the proper definition of "all covered operations."

The House report on the MPPAA makes clear that a virtually complete cessation of contribution, *e.g.*, a 98% reduction, will be treated as a complete withdrawal. H.R. Rep. No. 896, 96th Cong., 2d Sess. 73, *reprinted in* (1980) U.S. Code Cong. & Ad. News 2918, 2941. Regarding this piece of legislative history, one district court has noted, "[t]he case law uniformly follows this 'practical approach' in determining whether there has been a complete withdrawal". *F.H. Cobb. Co. v. N.Y.S. Teamsters Conference,* 584 F. Supp. 1181, 1183 (N.D.N.Y. 1984); *see also Speckman v. Barford Chevrolet Co.,* 535 F. Supp. 488 (E.D. Mo. 1982). This

court elects to follow this "practical approach" and concludes that the word "all" in the phrase "all covered operations" does not mean a 100% cessation of covered operations, but rather, something less than 100%. In other words, a virtually complete cessation for covered operations.

The next step is to determine what is meant by the term "covered operations." An employer "ceases covered operations" if it ceases the business activity that gave rise to contributions to the plan. *Speckman v. Barford, supra;* Ford, McNamara, and Stanger, "Withdrawal Liability Under ERISA After the Multiemployer Pension Plan Amendments Act of 1980," N.Y.U. 39th Annual Inst. on Fed. Tax., ERISA Supp., §1002 at 10-6. Accordingly, this court must determine in what plan year did Allied accomplish a virtually complete cessation of its business activity that gave rise to its contributions to the Plan.

Plaintiffs contend that Allied ceased its covered operations under the Plan *prior to July 1, 1983, and thus, were properly assessed withdrawal liability as of Plan Year ending June 30, 1982.* Allied on the other hand, contends that it withdrew from the Plan subsequent to July 1, 1983, and therefore, should only be assessed withdrawal liability based on the Funds unfunded vested benefits as of June 30, 1983. At stake is approximately $235,000 - the difference between the Trustees' assessment of $559,108.57, based upon a June 30, *1982* determination, and $364,000, which would be the assessment based upon a June 30, *1983* determination.

It is undisputed that on June 16, 1982, Allied informed the Union by letter that Allied had decided to permanently shut down and close the plant operations in Bedford Park. However, an expression of intent to withdraw does not constitute an actual withdrawal within the meaning of the MPPAA. *See I.A.M. National Pension Fund Benefit Plan v. Stockton TRI Industries,* 727 F. 2d at 1211.

It is also not disputed that on March 30, 1984, Allied sold the Bedford Park plant property, and officially went out of business. However, March 30, 1984 is also not the relevant date because the test is not when the employer went out of business,

but rather, when did the employer cease covered operations.[6] Thus, the court must look to the period of time between June 16, 1982 and March 30, 1984, to ascertain when Allied ceased its covered operations under the Plan.

During a ten-year period ending June 30, 1982, Allied contributed over $1.3 million to the Plan, based on over 2.9 million hours worked by bargaining unit employees was slightly over 290,000 hours, or slightly over 24,000 hours per month. In contrast, by July 1982, the participating hours contributed by Allied to the Plan had dropped to slightly under 8,000 hours for that month. In August 1982, that number decreased even more, to just under 2,000 hours for that month. By September 1982 through December 1983, Allied's contribution hours averaged approximately 300 hours per month, which accounted for a minimal $300 a month in contributions.[7]

Moreover, in early July 1982, there were 48 bargaining unit employees on Allied's payroll at the Bedford Park plant. There were still 28 remaining in early August 1982, but by the end of that month, only five remained employed. Donald Steele, a maintenance man, remained employed at the plant until the land was sold on March 30, 1984. Charles Hearod, a fork lift operator, who was terminated in December 1982 but recalled in February 1983, also worked on the plant until March 30, 1984. Therefore, in just two months after its decision to close down operations, Allied employed merely a skeletal crew, if that, to clean and do maintenance work, and also, to identify, weigh and ship parts, scrap, raw materials and fixtures in inventory.[8]

Allied points out that since February 1983, it received and processed seven purchase orders for shipment of parts. The court notes, however, that two of these orders were received prior to July 1, 1983, and the remaining five occurred in August and

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[6] *ILGWU National Retirement Fund, et al., v. Weatherall Fashions, Inc.*, No. 84 Civ. 0772, slip op. (S.D.N.Y. Feb. 24, 1986).

[7] See Stipulation of Facts, attached as Exhibit "A" to Defendant's Statement of Material Facts, p. 4.

[8] *Id.*, at 5.

September 1983. In any event, these minimal activities can hardly be classified as normal business operations. In addition, the shipment of inventory to other divisions within the Allied family cannot be considered normal business activity. These are simply activities that are necessitated when a company has already ceased normal business operations. Accordingly, this court finds that Allied ceased "all covered operations" within the meaning of the MPPAA prior to July 1, 1983. (In fact, this court opines that Allied ceased its covered operations by the very latest, December 1982).

This conclusion is supported by applicable case law. A permanent cessation can occur even though an employer remains signatory to a collective bargaining agreement requiring contributions to the plan. *Speckman v. Bedford Chevrolet Co.*, 535 F. Supp. at 491. In *Speckman*, an automobile dealership closed down and sold its facilities prior to the effective date of the MPPAA. The employer retained one employee to perform phase-out work and made pension plan contributions on behalf of that employee subsequent to the effective date of the MPPAA. The *Speckman* court held that the employer's retention of a sole employee and its contribution to the Plan on his behalf did not prevent its cessation of all covered operations from being complete within the meaning of the MPPAA.[9]

Further, in *Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.*, 607 F. Supp. 570 (S.D.N.Y. 1985), the court found that where an employer which ceased its normal business operation, liquidated its assets and maintained a skeleton staff to aid in clean-up work effected a complete withdrawal from the plan.

Finally, in *ILGWU National Retirement Fund, et al., v. Weatherall Fashions, Inc.*, No. 84 Civ. 0772, slip op. (S.D.N.Y.

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[9] The arbitrator distinguished *Speckman* on the ground that the dealership in *Speckman* had been sold while the Bedford Park plant in this case was not sold until March 30, 1984, and that is when "all covered operations" ceased. The arbitrator misread *Speckman*. Clearly, the importance of *Speckman* centers around the retention of the one employee and the employer's contributions on his behalf.

Feb. 24, 1986), a case that closely resembles this one, the court found that the employer's minimal continued operations does not postpone withdrawal liability under the MPPAA. In *Weatherall,* the employer ceased covered operations in December 1981, and began rapidly winding down *meaningful* business activity, retaining only one employee, a shipping clerk. However, the firm remained in existence until 1985, when the office finally closed. The employer contended that it could not incur withdrawal liability in December 1981 because of its continuation in business until 1985. The court rejected this argument, noting that "the Fund does not assert that Weatherall went out of business in 1981, but rather that it 'ceased covered operations' in December, 1981 and that the continued viability of Weatherall's corporate form does not prevent withdrawal liability from attaching." Similarly, here the Trustees simply determined that Allied "ceased covered operations" prior to July 1, 1983, and not that Allied went out of business prior to that date. As stated previously, the facts clearly support this determination.

CONCLUSION

The court finds that defendant Allied ceased "all covered operations" within the meaning of the MPPAA prior to July 1, 1983 as the Trustees of the Plan had originally determined. Therefore, the Trustees' withdrawal liability assessment of $559,108.57, based upon a June 30, 1982 determination is correct. Accordingly, this court recommends that plaintiff's motion for summary judgment be granted and the defendant's summary judgment motion be denied; that the arbitrator's opinion and award be vacated; and that the Trustees' withdrawal liability assessment of $559,108.57 be reinstated.[10]

Dated: December 8, 1986

Respectfully submitted,

/s/ W. THOMAS ROSEMOND, JR.

W. Thomas Rosemond, Jr.
United States Magistrate

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[10] Counsel are given ten days from the date hereof to file exceptions to this Report and Recommendation with the Honorable John A. Nordberg. Failure to file objections within the specified time waives the right to appeal the magistrate's order. *Video Views, Inc., v. Studio 21 Ltd., et al.,* No. 86-1039, slip. op. at 3 (7th Cir. August 4, 1986).